

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,)
1030 15th Street NW, B255)
Washington, DC 20005)
)
)
Plaintiff,)
)
v.) Case No. 19-2577
)
)
U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)
200 Independence Avenue SW)
Washington, DC 20201)
)
)
Defendant.)
)

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Health and Human Services under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency

from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, nonprofit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Health and Human Services (HHS) is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

Ethics FOIA Request

7. On March 18, 2019, American Oversight submitted a FOIA request to HHS seeking records reflecting Secretary Alex Azar's communications with his former employers and other personally affiliated organizations, as follows:

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials reflecting communications) between Secretary Alex Azar or any person

communicating on his behalf, such as schedulers or assistants, and any of the individuals or entities listed below:

- 1) Eli Lilly and Company
- 2) Lilly USA, LLC
- 3) Healthcare Leadership Council
- 4) HMS Holdings, Inc.
- 5) Biotechnology Innovation Organization
- 6) Seraphim Strategies, LLC

8. The request sought all responsive records from January 29, 2018, to the date the search is conducted. A copy of the Ethics FOIA Request is attached hereto as Exhibit A and incorporated herein.

9. In a letter dated March 18, 2019, HHS acknowledged receipt of the Ethics FOIA Request and assigned it tracking number 2019-00704-FOIA-OS.

Brand-Name Drug Companies FOIA Request

10. Also on March 18, 2019, American Oversight submitted a FOIA request to HHS seeking Secretary Azar's communications with top brand-name drug companies, as follows:

All communications (including emails, email attachments, text messages, calendar invitations, calendar entries, meeting notices, meeting agendas, or talking points), as well as any summaries of or notes taken during any oral communications, between Secretary Alex Azar or any person communicating on his behalf, such as schedulers or assistants, and any individuals associated with the entities listed below:

- 1) Johnson & Johnson
- 2) Pfizer
- 3) Novartis
- 4) Sinopharm Group
- 5) Roche
- 6) Sanofi
- 7) GlaxoSmithKline
- 8) Merck & Co
- 9) Bayer
- 10) Gilead Sciences
- 11) AbbVie
- 12) Amgen

- 13) AstraZeneca
- 14) Bristol-Myers Squibb
- 15) Boehringer Ingelheim
- 16) Takeda

11. The request sought all responsive records from January 29, 2018, to the date the search is conducted. A copy of the Brand-Name Drug Companies FOIA Request is attached hereto as Exhibit B and incorporated herein.

12. HHS assigned the Brand-Name Drug Companies FOIA Request tracking number 2019-00705-FOIA-OS.

Indiana Drug Companies FOIA Request

13. Also on March 18, 2019, American Oversight submitted a FOIA request to HHS seeking Secretary Azar's communications with Indiana-based drug companies, as follows:

All communications (including emails, email attachments, text messages, calendar invitations, calendar entries, meeting notices, meeting agendas, or talking points), as well as any summaries of or notes taken during any oral communications) between Secretary Alex Azar or any person communicating on his behalf, such as schedulers or assistants, and any individuals associated with the entities listed below:

- 1) Assembly Biosciences
- 2) Apexian Pharmaceuticals
- 3) Baxter BioPharma Solutions
- 4) Catalent
- 5) Endocyte
- 6) Evonik
- 7) Exelead
- 8) KP Pharmaceutical Technology
- 9) Lannett
- 10) Mead Johnson
- 11) Novo Nordisk
- 12) PD Pharmatech
- 13) IQVIA
- 14) AIT Bioscience
- 15) Anagin
- 16) Maetrics
- 17) Theratome Bio

14. The request sought all responsive records from January 29, 2018, to the date the search is conducted. A copy of the Indiana Drug Companies FOIA Request is attached hereto as Exhibit C and incorporated herein.

15. In a letter dated March 18, 2019, HHS acknowledged receipt of the Indiana Drug Companies FOIA Request and assigned it tracking number 2019-00708-FOIA-OS.

Agency Correspondence

16. In three letters dated April 3, 2019, HHS sought clarification regarding the subject matter of each of the three requests described above. In each letter, HHS stated that the relevant request was not reasonably described and that it could not perform an adequate search for responsive records because American Oversight's request did not include corresponding domain names associated with the individuals and entities described in the request. HHS placed the requests in "tolled" status pending clarification. These three clarification letters are attached hereto as Exhibits D, E, and F and incorporated herein.

17. In an email sent April 5, 2019, American Oversight responded to all three letters. While objecting to HHS's assertion that the requests were not reasonably described, American Oversight identified in an attached Word document the domain names associated with the vast majority of entities and individuals at issue in the three requests.¹ American Oversight's email and attachment are attached hereto as Exhibit G and incorporated herein.

18. In the same email, American Oversight further clarified that searches for responsive records should not be limited to searches for the domain names it provided, as it had no way of knowing whether these were the only domain names used by the individuals or entities

¹ The only exception was Seraphim Strategies, LLC, for which American Oversight requested that HHS search "seraphim" in the to/from/cc/bcc/subject/body fields of emails.

listed in the requests. Accordingly, American Oversight requested that HHS search for the names of the individuals and entities themselves in full-text searches of the “Subject” lines and body text of email communications, and also search for any additional domain names associated with the individuals or entities listed HHS may identify in the course of its search. American Oversight also stated that the requests sought communications beyond emails, and thus HHS’s search should include full-text searches of other record types as well.

19. HHS subsequently changed the status of the three requests to “In Process.”

20. As of the date of this Complaint, American Oversight has not received any further communication from HHS regarding any of the three FOIA requests described above and the status of each remains “In Process.”

Exhaustion of Administrative Remedies

21. As of the date of this Complaint, HHS has failed to (a) notify American Oversight of any determination regarding American Oversight’s FOIA requests, including the full scope of any responsive records the agency intends to produce or withhold and the reasons for any withholdings; or (b) produce all of the requested records or demonstrate that the requested records are lawfully exempt from production.

22. Through Defendant’s failure to make determinations as to American Oversight’s FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

23. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

24. American Oversight properly requested records within the possession, custody, and control of Defendant.

25. Defendant is an agency subject to and within the meaning of FOIA and must therefore make reasonable efforts to search for requested records.

26. Defendant has failed to promptly and adequately review agency records for the purpose of locating those records which are responsive to American Oversight's FOIA requests.

27. Defendant's failure to conduct adequate searches for responsive records violates FOIA.

28. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to conduct adequate searches for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

29. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

30. American Oversight properly requested records within the possession, custody, and control of Defendant.

31. Defendant is an agency subject to and within the meaning of FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

32. Defendant is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

33. Defendant is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

34. Defendant's failure to provide all non-exempt responsive records violates FOIA.

35. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests identified in this Complaint;
- (2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: August 27, 2019

Respectfully submitted,

/s/ Christine H. Monahan

Christine H. Monahan

D.C. Bar No. 1035590

Sara Kaiser Creighton

D.C. Bar No. 1002367

AMERICAN OVERSIGHT

1030 15th Street NW, B255

Washington, DC 20005

(202) 877-0606

christine.monahan@americanoversight.org

sara.creighton@americanoversight.org

Counsel for Plaintiff